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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

EDGAR H. GILLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 587 F.2d 284. An earlier memorandum opinion of the court of appeals remanding the case for further proceedings (Pet. App. 56a-58a) is not reported; the judgment order in that case is reported at 559 F.2d 1222 (table). The opinions of the district court (Pet. App. 59a-74a; A. 8-19) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 52a-53a) was entered on November 1, 1978. A timely petition for rehearing was denied on January 17,

1979 (Pet. App. 54a-55a). On February 7, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including March 18, 1979 (a Sunday). The petition was filed on March 19, 1979, and was granted on May 14, 1979 (A. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Rule 501 of the Federal Rules of Evidence encompasses a common-law "legislative privilege," similar to that under the Speech or Debate Clause of the Constitution, that prohibits the federal government from adducing evidence of the legislative acts of a state legislator in a federal criminal prosecution.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Article I, Section 6, cl. 1, of the United States Constitution provides in part:

> The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rule 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Article II, Section 13 of the Tennessee Constitution provides:

> Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

STATEMENT

1. On August 12, 1976, respondent, then a Tennessee state senator, was indicted in the United States District Court for the Western District of Tennessee on five counts of obtaining money under color of official right (18 U.S.C. 1951), one count of using an interstate facility to distribute a bribe (18 U.S.C. 1952), and one count of participating in an enterprise through a pattern of racketeering activity (18 U.S.C. 1962).[1] The indictment was based on respondent's alleged abuse of his legislative position to extract money from victims in two separate schemes—the first to prevent the extradition of a Tennessee prisoner to Illinois, the second to enact legislation that would enable four individuals to procure master electrician's licenses (Pet. App. 3a-4a; A. 3-7).

Before trial, respondent moved to suppress evidence of his legislative acts performed in connection with the alleged extortion schemes.[2] Respondent claimed

[1] On October 5, 1976, the district court dismissed the count based on the Travel Act, 18 U.S.C. 1952. The court concluded that the facts alleged in the indictment did not constitute a violation of the Tennessee bribery statute (Tenn. Code Ann. § 39-802 (1975)), and that therefore the indictment failed to allege a violation of the Travel Act (A. 8-9). Alternatively, the court held that the count was defective because the government had failed to allege sufficiently (1) that respondent had used interstate facilities with intent to distribute the proceeds of an unlawful activity, and (2) that thereafter respondent had attempted to distribute those proceeds (A. 9). The correctness of these rulings is not before the Court.

[2] Previously, respondent had moved to dismiss all counts of the indictment on various grounds. On October 5, 1976,

that a common law privilege for state legislators, equivalent in scope to the protection afforded federal Congressmen under the Speech or Debate Clause, precludes the federal government from introducing any evidence of "legislative acts or motivation therefor" in a federal criminal trial (Pet. App. 59a). The district court granted the motion, holding that a common law privilege akin to the Speech or Debate Clause privilege exists under Rule 501 of the Federal Rules of Evidence. The court stated that such a legislative privilege is necessary "to protect the integrity of the [state] legislative process by insuring the independence of individual legislators * * * [and] to preserve the constitutional relation between our federal and state governments in our federal system" (Pet. App. 73a).

2. The government appealed, and the court of appeals vacated the district court's blanket ruling and remanded for a more specific finding with regard to particular items of the government's proposed case (Pet. App. 56a-58a). On remand, the government tendered an offer of proof setting forth with specificity the evidence to be relied on by the prosecution in attempting to establish respondent's extortion of money

the district court granted this motion only as to the second count of the indictment (A. 8-13). See note 1, *supra*. Subsequently, on November 9, 1976, the court denied respondent's renewed motion to dismiss on the basis of his claimed legislative immunity from federal criminal prosecution (A. 16-17). In addition, the court rejected respondent's contentions regarding preindictment delay (A. 17-18) and the coverage of the Hobbs Act, 18 U.S.C. 1951 (A. 14-16).

under color of official right, in connection with the extradition of a Tennessee prisoner and legislation concerning electrician license reciprocity (Pet. App. 39a-51a).

The extradition matter arose out of the arrest in Memphis, Tennessee in November 1974 of a fugitive from Illinois named James Michael Williams. The government proposed to demonstrate that in January 1975 Williams' attorney, John Hundley, told Williams' sister, Ruth Howard, that "he had a 'friend' who could help her brother, but it would 'cost a small sum of money'" (Pet. App. 41a). Howard subsequently met with respondent on several occasions and was told that respondent required $2,500 for his assistance. Thereafter Howard and Williams gave respondent and Hundley a $1,500 promissory note and promised to pay another $1,000 in cash. Respondent, in turn, acted to block Williams' extradition. He attended Williams' extradition hearing on March 6, 1975, reviewed the case file, and questioned the Assistant Attorney General for the state on various matters, including the propriety of extraditing a prisoner for a misdemeanor.[3] Later that day, respondent made an official request for an opinion of the Tennessee Attorney General regarding extradition on a misdemeanor charge (Pet. App. 41a-44a).[4]

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[3] Williams had escaped from an Illinois state prison while serving a sentence for a misdemeanor (Pet. App. 42a).

[4] Under Tennessee law, a state senator is apparently entitled to make an official request for such an opinion. On March 27, 1975, the Attorney General issued an opinion in response to the request (Pet. App. 43a).

In addition, the government sought to introduce into evidence several tape recordings of face-to-face and telephonic conversations on March 18, 19, 21 and 25, 1975, between Howard and Hundley and between Howard and respondent. In these taped conversations, respondent asserted that he could have blocked Williams' extradition by exerting pressure on the extradition hearing officer when that officer appeared before a senate committee of which respondent was a member to discuss a budget request. Respondent had not done so, however, because Howard had not reached Memphis in time to pay respondent the $1,000 in cash. Finally, the government alleged that respondent had attended a meeting of the senate judiciary committee on March 19, 1975, and that the extradition hearing officer had presented his department's budget request to the committee at that meeting (Pet. App. 44a-45a).

The government's offer of proof also described in detail respondent's participation in an extortion scheme regarding master electricians' licenses. At a meeting in his office in early 1972, respondent allegedly demanded $5,000 from each of four electricians as the quid pro quo for the introduction and passage of legislation that would have facilitated the licensing of these electricians in Shelby County, Tennessee (Memphis). The electricians had previously failed that county's licensing examination. The legislation would have established a system of reciprocity for county and municipal electrician licenses in the State of Tennessee, thereby enabling the electricians to work lawfully in Memphis by passing an easier

test in another jurisdiction. Two of the electricians paid respondent $5,000 on condition that the legislation be enacted, and respondent executed a written agreement to that effect. Respondent subsequently introduced such legislation in the senate, arranged for the introduction of a similar bill in the Tennessee house of representatives, and guided the bill through the legislature to passage. At that time several private individuals met with respondent to voice their opposition to his bill. Respondent informed them that he had accepted fees for this legislation and could not afford to withdraw the bill. The governor, however, subsequently vetoed the bill, and the senate failed to approve respondent's motion to override the veto (Pet. App. 46a-49a; A. 20).

3. The district court granted respondent's renewed motion to exclude evidence of his legislative acts. The court concluded that much of the government's offer of proof is inadmissible under Rule 501 of the Federal Rules of Evidence. Thus, the court held that respondent's official request for an opinion of the Attorney General regarding extradition and the answer to that request constituted legislative acts. Similarly inadmissible, according to the district court, are respondent's statements to Howard that he could have held up the extradition because the extradition hearing officer appeared before his senate committee and also proof that the hearing officer actually did testify before respondent's committee. The court further ruled inadmissible all evidence regarding the electrician licensing legislation, including respondent's introduc-

tion of the legislation, his conversations with private individuals who opposed the legislation, and the governor's veto message (Pet. App. 59a-64a).

4. The government again appealed. A divided court of appeals recognized a legislative privilege under Rule 501, and substantially affirmed the district court's rulings excluding portions of the government's proposed evidence.[5] In reaching its conclusion, the court initially stated (as the parties had previously conceded) that neither the Tennessee constitutional provision regarding legislative privilege nor the federal Speech or Debate Clause directly applies to a federal prosecution of a state legislator (Pet. App. 2a-3a). The court also noted that this Court has never passed upon the existence of a common law legislative privilege and that two other courts of appeals had squarely held that Rule 501 does not encompass such a privilege (*id.* at 15a). Nonetheless, the court concluded that "the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that his-

[5] The court of appeals, relying on this Court's pertinent Speech or Debate Clause cases, reversed the district court as to (1) the opinion of the Tennessee Attorney General regarding the extradition of one of respondent's alleged victims, (2) testimony of conversations between (a) respondent and Howard, and (b) respondent and opponents of the electrician licensing bill, and (3) the governor's veto message (Pet. App. 16a-26a). Although we do not agree with all aspects of the court of appeals' application of the legislative privilege (see *United States* v. *Johnson*, 383 U.S. 169, 172 (1966); *Hutchinson* v. *Proxmire*, No. 78-680 (June 26, 1979), slip op. 14-18), we have not asked this Court to review the rulings below on specific items of evidence. See Pet. 5 n.1.

tory in the cases [of the Supreme Court]" justify recognition of a common law privilege in the context of a federal criminal prosecution of a state legislator (*ibid.*).[6]

Judge Weick dissented, believing that "the federal courts ought not to innovate and create a new privilege for the protection of state legislators who violate the criminal laws of the United States" (Pet. App. 26a-27a). Judge Weick explained that because the speech or debate privilege emerged as a means of ensuring the independence of coordinate branches of the same government, the doctrine of separation of powers does not justify extending the privilege to the context of federal prosecutions of state legislators (*id.* at 31a-33a).

SUMMARY OF ARGUMENT

This case raises the issue whether Rule 501 of the Federal Rules of Evidence encompasses an evidentiary privilege that bars the admission of evidence of a state senator's legislative acts at his federal criminal trial. Such a legislative privilege is essentially unprecedented. The federal government has regularly prosecuted corrupt local officials, including state legislators, and has routinely used evidence of their official acts when those acts are probative of the commission of a federal crime. *E.g.*, *Anderson* v. *United States*, 417 U.S. 211, 214-215 (1974); *United States*

[6] In particular, the court cited *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *United States* v. *Johnson*, 383 U.S. 169 (1966); and *United States* v. *Brewster*, 408 U.S. 501 (1972).

v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, No. 78-879 (Jan. 15, 1979); *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir.), cert. denied, 423 U.S. 1014 (1975). This Court has never suggested that state legislators enjoy an evidentiary privilege akin to that provided by the Speech or Debate Clause for federal Congressmen, and, indeed, the proposed rules of evidence promulgated by the Court in 1972 did not include such a privilege.

Not only is a legislative privilege unprecedented, but it is also unwarranted. Rule 501 provides that except as required by the Constitution, an Act of Congress, or rules prescribed by the Court, evidentiary privileges are to be "governed by the principles of the [federal] common law as they may be interpreted * * * in the light of reason and experience." It is a well established precept of the common law of privileges that the public has the right to every man's evidence and that therefore privileges are to be eschewed except in the most compelling of circumstances. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 709 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). As the Court stated in *United States* v. *Nixon*, *supra*, 418 U.S. at 710: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."

It is undisputed that the Speech or Debate Clause does not confer any privilege on state legislators. Nonetheless, respondent and the court of appeals (Pet. App. 15a) suggest that "the long history and

the felt need for protection of legislative speech or debate" support recognition of such a privilege. However, careful analysis of the relevant precedents of this Court and the history of the Speech or Debate Clause establishes that the legislative privilege sought by respondent would not materially serve the policies that inform the Speech or Debate Clause. To the contrary, acceptance of respondent's contentions would cast legislative privilege adrift from its traditional moorings.

First, the Speech or Debate Clause, as well as its English counterpart, is historically a source of legislative immunity. In this century the Clause has, in addition, been construed to constitute an evidentiary privilege. That privilege serves essentially as a prophylaxis to guard against invasions of the underlying immunity. Where there is no immunity, on the other hand, a legislator acts at his own peril and may be forced to defend his non-immunized actions in a court of law. See, *e.g.*, *Hutchinson* v. *Proxmire*, No. 78-680 (June 26, 1979); *Gravel* v. *United States*, 408 U.S. 606 (1972). Accordingly, where there is no immunity there is no historical or logical basis for recognizing an evidentiary privilege.

Although the federal law affords state legislators, judges, and prosecutors an absolute *civil* immunity, those officials enjoy no immunity from the federal criminal law. As the Court explained in *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974):

> [W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates [criminal immunity]. * * * On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress * * *."

Because respondent, unlike a federal Congressman, is subject to federal criminal liability for his legislative acts, it is senseless to preclude the federal government from adducing evidence of those acts at his criminal trial.

Moreover, even if the federal law did recognize a criminal immunity for state legislators, it does not follow that respondent is entitled to an evidentiary privilege as well. The Speech or Debate Clause is a constitutional mandate, whereas respondent at best enjoys a common law immunity, and the pertinent decisions of this Court suggest that the latter is not to be construed as broadly as the former. In particular, it is not at all apparent that a common law immunity necessarily encompasses an evidentiary privilege similar to that associated with the Speech or Debate Clause. To the contrary, where, as here, the federal government prosecutes a state legislator for essentially non-legislative acts, there appears to be no compelling justification for barring introduction of the defendant's legislative acts solely to corroborate his non-immunized extra-legislative crime. The risk that such evidentiary use will significantly trench upon the independence of state legislators is simply not substantial enough to justify the cost that

the privilege would entail for the administration of criminal justice in the federal courts.

The tradition of speech or debate privilege in this country does not support creation of a legislative privilege for still another reason. As the Court has often reiterated, the Speech or Debate Clause is predicated on the separation of powers doctrine. See, *e.g.*, *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), slip op. 13. Here, however, the federal government as a whole is acting to punish an individual state legislator for a violation of federal law. Since this prosecution, like the federal prosecution of a corrupt state judge or governor, does not implicate the separation of powers concerns that inform the Speech or Debate Clause, the courts below erroneously concluded that respondent's claim of privilege derives sustenance from this Court's Speech or Debate Clause jurisprudence.

Finally, respondent wrongly relies on the principles of federalism. It cannot reasonably be contended that the federal prosecution of an individual state legislator for essentially non-legislative acts violates the Tenth Amendment. Since respondent's alleged conduct is proscribed by both state and federal law, the instant prosecution (including use of evidence of his legislative acts) cannot fairly be described as displacing essential and traditional state policies. Compare *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Nor is there any serious doubt about the constitutionality of federal evidentiary rules that derogate state evidentiary privileges. See *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965); Fed. R. Evid. 501. Finally, without denigrating the interest of the states in forthright and uninhibited performance of legislative duties, the same state interests in the case of judges and prosecutors—who, like legislators, are afforded absolute common law immunity from civil suit—has not been deemed sufficient to shield such officials from federal prosecutions implicating their official acts. Since federal prosecution of such officials poses essentially the same danger (de minimis in our view) of inhibiting them in the due discharge of their important official functions as does federal prosecution of legislators, principles of federalism supply little basis for creating a privilege unique to state legislators.

ARGUMENT

RULE 501 OF THE FEDERAL RULES OF EVIDENCE DOES NOT ENCOMPASS A COMMON LAW EVIDENTIARY PRIVILEGE THAT BARS PROOF OF A STATE SENATOR'S LEGISLATIVE ACTS IN A FEDERAL CRIMINAL TRIAL

It is a well recognized principle of federal jurisprudence that testimonial privileges are not to be lightly created or expansively construed (see pages 20-24, *infra*). Nevertheless, the court of appeals has in this case endorsed a new evidentiary privilege that would bar the admission of evidence of a state senator's legislative acts at his federal criminal trial. The decisions of this Court contain no suggestion that such a privilege exists or should be created;

moreover, the rules of evidence proposed by this Court in 1972 did not include a privilege for state legislators. See Proposed Fed. R. Evid. 501-513, 56 F.R.D. 230-261 (1972). Although Congress ultimately determined not to adopt any rules specifically defining evidentiary privileges, see H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8 (1973), the absence of a legislative privilege in the proposed rules suggests the unprecedented nature of the privilege recognized by the court of appeals. See 2 *Weinstein's Evidence* ¶ 501[02], at 501-20.5 (1979). Cf. 78 Harv. L. Rev. 1473, 1474 n.6 (1965).[7]

In concluding that respondent may not be questioned about his legislative acts (even though they constitute relevant evidence of a federal crime), the court of appeals relied heavily on opinions of this Court construing the Speech or Debate Clause of the United States Constitution, Art. 1, Sec. 6, cl. 1 (Pet. App. 8a-15a). That reliance is misplaced. As we demonstrate below (pages 24-44), the doctrines of

[7] Our research reveals that the first appellate court to suggest the existence of a legislative privilege was a divided panel of the Seventh Circuit in *United States* v. *Craig*, 528 F.2d 773, cert. denied, 425 U.S. 973 (1976). The en banc Seventh Circuit subsequently reversed, adopting the concurring opinion of Judge Tone rejecting the propriety of recognizing such a privilege. 537 F.2d 957, cert. denied, 429 U.S. 999 (1976). Thereafter, the First and Third Circuits took opposing views on this issue. Compare *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978), with *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977); but see *id.* at 586 (Gibbons, J., concurring) (rejecting "majority's dictum" concerning legislative privilege).

immunity and separation of powers that inform the Speech or Debate Clause are not implicated by the federal government's proof of a state senator's legislative acts at his criminal trial. Nor, as respondent suggests (Br. in Opp. 12), is a common law legislative privilege justified "by the nature of the delicate state-federal relationship." See pages 44-52, *infra*. In short, neither precedent, reason, nor experience supports the creation of a federal common law privilege barring proof of legislative acts of a state legislator.

A. Rule 501 Does Not License The Courts To Create And Expand Evidentiary Privileges, Except In Compelling Circumstances.

1. *Rule 501 governs the creation of federal evidentiary privileges*

At the outset, we note what has been common ground in this litigation to date: the existence vel non of a legislative privilege in a federal criminal trial is a question of federal common law governed by Rule 501 of the Federal Rules of Evidence.[8] Rule 501 provides that "[e]xcept as otherwise required by the Constitution of the United States * * * the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience." The one federal constitutional provision arguably

[8] Both the court of appeals (Pet. App. 3a) and respondent (*ibid.*; Resp. Br. in Opp. 10) have concurred in this view.

governing respondent's claim of privilege is the Speech or Debate Clause. But that Clause by its own terms protects only federal Congressmen and is therefore not applicable to state legislators. *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, No. 77-1327 (March 5, 1979), slip op. 12; *United States* v. *DiCarlo*, 565 F.2d 802, 805 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978); *In re Grand Jury Proceedings*, 563 F.2d 577, 580-581 (3d Cir. 1977).[9]

Moreover, the existence of a legislative immunity in the Tennessee constitution akin to the Speech or Debate Clause does not control the disposition of this case. Even before the promulgation of Rule 501, the admissibility of evidence in a federal criminal trial—including the question of privileges—was not governed by the "local rules in * * * the particular state where the trial takes place, but [was] governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience." *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934). See also *Ker* v. *California*, 374 U.S. 23, 31 (1963); *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring); *Funk* v. *United States*, 290 U.S. 371 (1933). Rule 501, which is derived from former Rule 26 of the Federal

[9] Rule 501 also makes exception for privileges "provided by Act of Congress or in rules prescribed by the Supreme Court * * *." No such statute or rule applies to this case.

Rules of Criminal Procedure (1971)[10] and the language in *Wolfle* quoted above, merely codifies this long-established approach to evidentiary privileges in federal criminal trials. And, given the Supremacy Clause, the express language of Rule 501 establishes that the existence of a particular state evidentiary privilege does not determine the application and existence of evidentiary privileges in the federal criminal context.[11] Thus, the issue of legislative privilege, like the issue of legislative immunity under the Civil Rights Act, 42 U.S.C. 1983, does "not depend on the presence of a Speech or Debate Clause in the Constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra*, slip op. 13.[12]

[10] Former Rule 26 provided in pertinent part:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

[11] *In re Grand Jury Proceedings, supra*, 563 F.2d at 582; *United States* v. *Craig*, 528 F.2d 773, 781 (7th Cir.) (Tone, J., concurring), cert. denied, 425 U.S. 973 (1976), adopted, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 7 (1974); S. Rep. No. 93-1277, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8 (1973); 2 *Weinstein's Evidence* ¶ 501[03], at 501-24 to 501-25 (1979).

[12] This is not to say, however, that in all contexts the federal courts, in formulating federal rules of evidence, must necessarily ignore the presence or absence of a privilege under

2. *The federal common law reflects a measured hostility to the creation and extension of evidentiary privileges*

Although this Court has considered questions of evidentiary privilege on several prior occasions, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), it has never given plenary consideration to Rule 501.[13] In *Fisher* v. *United States*, 425 U.S. 391, 402 n.8 (1976), however, the Court observed that Rule 501 incorporates the "principles of the common law" and that therefore questions concerning evidentiary privileges will depend upon the application of existing authority "interpreted * * * in the light of reason and experience." Fed. R. Evid. 501. Accordingly, the Court's prior decisions involving creation and application of testimonial privileges provide significant

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state law. In the present context, it would seem somewhat incongruous for federal courts to afford a privilege to state legislators that they would not enjoy in their own courts, since the marginal contribution of such a rule to legislative independence would be slight whenever there existed no constraints upon state court inquiry into legislative acts. Of course, nothing in Rule 501 precludes adoption of a general federal rule under which a state legislator would be afforded a privilege as broad as, but no broader than, that available in the courts of his state. While such an approach was evidently deemed inappropriate in connection with the issue before the Court in *Lake Country Estates*, the selection of the proper federal rule should depend upon an evaluation of the federal and state policies at stake in connection with the particular claim of privilege or immunity under consideration.

[13] Currently pending before the Court is another case involving Rule 501, *Trammel* v. *United States*, cert. granted, No. 78-5705 (Feb. 26, 1979).

guidance to the proper resolution of the question presented by this case. See H.R. Rep. No. 93-650, *supra*, at 8; H.R. Conf. Rep. No. 93-1597, *supra*, at 8; 120 Cong. Rec. 40891 (1974) (remarks of Rep. Hungate). See also 2 *Weinstein's Evidence* ¶ 501[02], at 501-17 to 501-18, 501-20.5 (1979).

In addressing various claims of privilege, the Court has repeatedly reaffirmed the seminal principle that "'the public * * * has a right to every man's evidence.'" *United States* v. *Bryan*, 339 U.S. 323, 331 (1950); *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688; *United States* v. *Nixon*, 418 U.S. 683, 709 (1974). See also *Herbert* v. *Lando*, No. 77-1105 (Apr. 18, 1979), slip op. 20; *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932); 8 J. Wigmore, *Evidence* § 2192 (McNaughton rev. 1961). Because testimonial privileges preclude the use of highly relevant evidence and therefore tend to be "an obstacle to the administration of justice," Wigmore, *supra*, at 73; see *United States* v. *Nixon*, *supra*, 418 U.S. at 711-713, such privileges are tolerable only when they "are designed to protect weighty and legitimate competing interests." *Id.* at 709. See also *Herbert* v. *Lando*, *supra*; *Elkins* v. *United States*, *supra*, 364 U.S. at 234 (Frankfurter, J., dissenting); *United States* v. *Bryan*, *supra*.

For example, in *Clark* v. *United States*, 289 U.S. 1 (1933), the defendant, who had previously served on a federal jury in an allegedly corrupt fashion, claimed a privilege as to her vote and deliberations as a juror. The unanimous Court, in an opinion by

Mr. Justice Cardozo, concluded that although "the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity," *id.* at 16, nonetheless the administration of justice required the admission of this highly probative evidence at a federal criminal trial. In a passage highly relevant to respondent's claim of privilege, the Court elucidated as follows (*id.* at 14):

> Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the [defendant], if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.[14]

This cautious, indeed hostile, approach to the creation and application of evidentiary privileges is also reflected in *United States* v. *Nixon, supra.* That case arose out of the President's claim of absolute privilege regarding all confidential communications between himself and his aides. The Court acknowledged the President's substantial need to discuss the affairs of state with his aides in confidence. 418 U.S. at 705-708, 711-713. The Court further recognized

[14] See also Proposed Rule of Evidence 507, 56 F.R.D. 183, 249 (1972), which provided that the privilege regarding the casting of ballots would be inapplicable to an illegally cast ballot.

that the Executive's claim of privilege had constitutional underpinnings in Article II of the Constitution and in the doctrine of separation of powers. *Ibid.* Nonetheless, the Court unanimously rejected the claim of privilege (except when based on military or diplomatic secrets) because "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts * * *." *Id.* at 709.

More recently, the Court has declined to create a new testimonial privilege emanating from the First Amendment. In *Herbert* v. *Lando, supra,* a television news editor contended that he was constitutionally entitled to refuse to testify regarding the exercise of his editorial judgment in preparing an allegedly libelous news show. The Court rejected this claim, noting that "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." Slip op. 20 (footnote omitted).[15] Similarly, the Court has previously concluded that the First Amendment does not grant reporters a testimonial privilege regarding their confidential news sources, at least where withholding such information would impede the administration of criminal justice. *Branzburg* v. *Hayes, supra.*

[15] We further note that the claim of privilege addressed in *Herbert* v. *Lando* arose in a civil context, whereas here the government seeks to use evidence of respondent's legislative acts in a criminal trial. See *United States* v. *Nixon, supra,* 418 U.S. at 712 n.19; cf. *United States* v. *Reynolds,* 345 U.S. 1, 12 (1953).

In sum, the federal common law strongly disfavors the creation of new evidentiary privileges (or the expansion of existing ones), even when the proposed privileges involve confidential communications and implicate constitutional principles. As the Court stated in *United States* v. *Nixon*, *supra*, 418 U.S. at 710: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Because, as we demonstrate below, the admission of a state senator's public legislative acts in a federal criminal trial implicates neither the principles that inform the speech or debate privilege nor the mandates of federalism, the court of appeals erred in recognizing a new state legislator's privilege. See *Gravel* v. *United States*, 408 U.S. 606, 627 (1972); *Clark* v. *United States*, *supra*.[16]

B. The Policies Informing The Speech Or Debate Clause And The History Of Legislative Privilege Do Not Support Creation Of A Federal Evidentiary Privilege On Behalf Of State Legislators

Although the Speech or Debate Clause does not control this case, the court of appeals did not err in looking to the history and purposes of that constitutional provision to aid in the resolution of the issue posed by this case. We cannot agree with the court of appeals, however, that "the long history and the felt

[16] In *Gravel* the Court refused to recognize a non-constitutional testimonial privilege for legislative aides over and above that provided by the Speech or Debate Clause.

need for protection of legislative speech or debate" (Pet. App. 15a), as reflected in this Court's Speech or Debate Clause cases, requires or even suggests the creation of a common law evidentiary privilege for state legislators.

The Speech or Debate Clause, like its English antecedents, is essentially and historically a source of legislative immunity. More recently, the courts have derived an evidentiary privilege from the Clause, but that privilege is inextricably linked to, and coterminous with, the immunity that is the focus of the Clause. Obviously, unless a state legislator is immune from any danger of imposition of federal criminal sanctions for his legislative acts, an evidentiary rule barring proof of such acts would have no rational purpose. Because, as we demonstrate in point 1, *infra*, respondent is not immune from federal criminal prosecution for his legislative acts, there is no logical or historical basis for creating a legislative privilege. *United States* v. *Craig*, *supra*, 528 F.2d at 782 (Tone, J., concurring); Comment, *A Speech or Debate Privilege For State Legislators Who Violate Federal Criminal Laws*, 68 J. Crim. L. & Criminology 31 (1977) (hereinafter *"Speech or Debate Privilege"*). Furthermore, in point 2, *infra*, we show that the court of appeals' reliance on this country's tradition of legislative privilege is misplaced because respondent's claim of privilege does not implicate the separation of powers concerns that primarily underlie the Speech or Debate Clause.

1. *The federal common law does not recognize a legislative privilege akin to the Speech or Debate Clause in the absence of an underlying legislative immunity*

a. Neither respondent nor the court of appeals has contested that the Speech or Debate Clause (like other legislative privileges) is essentially a grant of immunity, and that the evidentiary privilege emanating from the Clause is derived from, and commensurate with, the underlying immunity. This implied concession is well warranted. The history of legislative privilege, which has been canvassed in considerable detail in the Court's opinions and elsewhere,[17] demonstrates beyond dispute that the privilege is primarily an "exemption from [both civil and criminal] prosecution." *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808),[18] and not an evidentiary privilege. As the Court explained in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975), although a "central role" of the Clause is to establish congressional immunity against Executive intimidation, the Clause also "provides protection against civil as

[17] See generally *United States* v. *Johnson*, 383 U.S. 169, 178-183 (1966); *United States* v. *Brewster*, 408 U.S. 501, 507-521 (1972); C. Wittke, *The History of English Parliamentary Privilege* (1921); R. Reinstein & H. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1120-1144 (1973) (hereinafter "*Separation of Powers*").

[18] The *Coffin* case has been cited with approval by the Court on several occasions. *E.g.*, *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), slip op. 13; *Kilbourn* v. *Thompson*, 103 U.S. 168, 203 (1880).

well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." See also *Doe* v. *McMillan*, 412 U.S. 306, 312-315 (1973); *Gravel* v. *United States*, 408 U.S. 606, 621 (1972); *United States* v. *Brewster*, 408 U.S. 501, 507 (1972); *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82, 84-85 (1967).

Indeed, prior to the 20th Century, the reported decisions in both this country and England pertaining to legislative privilege involve only questions of immunity and not questions of evidentiary exclusion. See, *e.g.*, *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Coffin* v. *Coffin*, *supra*; *Bradlaugh* v. *Gossett*, 12 Q.B.D. 271 (1884); *Ex parte Wason*, 4 Q.B. 573 (1869); *Stockdale* v. *Hansard*, 9 A. & E. 1, 112 Eng. Rep. 1112 (Q.B. 1839).[19] See generally *Separation of Powers*, *supra*, note 17, 86 Harv. L. Rev. at 1123-1133; C. Wittke, *The History of English Parliamentary Privilege* (1921); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk U. L. Rev. 1, 6-13 (1968). The comparatively recent development of an evidentiary privilege associated with the Speech or Debate Clause has merely followed the scope of the immunity. Where the act in question is immune, it is also privileged. And where there is no

[19] A similar focus is reflected in the decisions of the other commonwealth countries. See *Regina* v. *Bunting*, 7 Ont. Rep. 524 (1885). See also *Dillon* v. *Balfour*, 20 L. Rep. Ir. 600 (1887).

immunity, there is no derivative protection in the form of a privilege against proof of the act. See generally Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 Yale L. J. 1280 (1979) (hereinafter "*Evidentiary Implications*").

For example, in *United States* v. *Johnson*, 383 U.S. 169 (1966), the federal government prosecuted a Congressman for violating the conflict of interest statute and for conspiring to defraud the United States. The prosecution arose out of a scheme in which, in exchange for money, Johnson attempted to influence the Department of Justice to dismiss pending indictments against various financial institutions. The government's case included proof of a speech by Johnson on the floor of the House and also Johnson's discussion with Justice Department officials. The Court held that the latter evidence was admissible because the Speech or Debate Clause does not immunize "conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U.S. at 172.

The *Johnson* Court concluded, however, that the prosecution's introduction of Johnson's speech and its cross-examination of Johnson and others regarding his motivation for delivering that speech violated "the policies which underlie [the Clause]," and that therefore such evidence was inadmissible. *Id.* at 177. Mr. Justice Harlan, writing for the Court, first noted that the government's inquiry into the Congressman's speech was central to the conspiracy charge. *Id.* at 177, 184. After tracing the history of the Speech or

Debate Clause, the opinion then summarized the primary purpose of the legislative immunity provided by the Constitution: "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is [a means] for ensuring the independence of the legislature." *Id.* at 179. Because, as Mr. Justice Harlan explained, the *Johnson* prosecution contravened this prophylactic purpose behind the legislative privilege, the government was constitutionally barred from inquiring into the contents of, and the motivation for, Johnson's speech. *Id.* at 180-185.[20]

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[20] Similarly, the English courts have construed the privileges of Parliament (Article 9 of the English Bill of Rights, 1 Will. & Mar. Sess. 2, ch. II (1688)) to constitute an evidentiary privilege as well as a source of civil and criminal immunity. But, as evidenced by the decision in *Church of Scientology* v. *Johnson-Smith*, [1972] 1 Q.B. 522, the evidentiary privilege thus created is also clearly derived from, and commensurate with, the underlying immunity. The *Church of Scientology* case arose out of a Member of Parliament's alleged libelous comments on a news program. In order to show malice, the plaintiff sought to introduce into evidence a speech regarding the Church of Scientology that the defendant had delivered in Parliament and that had subsequently been reported in the official debates (Hansard). The Attorney-General, acting as *amicus curiae*, argued as follows (*id.* at 524-525):

> A Member of Parliament cannot be sued directly for what he says in Parliament nor should he be challenged in any other proceedings. If the conduct of a Member could be impeached by indirect proceedings the privilege of Parliament would be rendered ineffective. * * * If, as in the present case, a Member of Parliament is sued for defamation for what he had said outside Parliament then the inquiry in court must be limited to what had

Thus, the analysis in *Johnson* unequivocally demonstrates that the evidentiary privilege emanating from the Speech or Debate Clause is based upon, and commensurate with, the underlying immunity.[21] Where a Congressman's act, such as Johnson's speech, is immunized because of its legislative nature, evidence of that act may not be used to support a civil or criminal suit against the Congressman. Where, however, no immunity attaches to the Congressman's act, such as the overtures made by Johnson to the Department of Justice, no testimonial privilege regarding those acts arises. See also *Gravel* v. *United States*, *supra*, 408 U.S. at 618, 622, 626-629; *United States* v. *Helstoski*, *supra*, slip op. 11; cf. *Hutchinson* v. *Proxmire*, No. 78-680 (June 26, 1979), slip op. 11-21.

The reason for this congruence between immunity and privilege may readily be discerned. Evidence of

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been said outside Parliament. Therefore if he repeats verbatim what he had said in Parliament he could still only be sued for what he had said outside Parliament.

The court held the evidence inadmissible, expressly accepting the argument of the Attorney-General that the evidence must be excluded as a means of fully protecting the privilege of Parliament. *Id.* at 528-529. See also *Roman Corp.* v. *Hudson's Bay Oil & Gas Co.*, [1971] 2 Ont. Rep. 418, 419-423, 18 Dom. L. Rep. 3d 134, 135-139 (Ont. H.C.), aff'd, [1973] Sup. Ct. Rep. 820, 36 Dom. L. Rep. 3d 413 (S. Ct. Can.); *Rex* v. *Boston*, 33 Commw. L. Rep. 386 (Austl. 1923); Mummery, *The Privilege of Freedom of Speech in Parliament*, 94 L.Q. Rev. 276, 283-284 (1978); cf. *Dingle* v. *Associated Newspapers Ltd.*, [1960] 2 Q.B. 405.

[21] "The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence." 383 U.S. at 176.

legislative acts may not be adduced in a prosecution of or suit against a Congressman in order to guard against the danger that liability will be imposed on account of such acts or that the Congressman will feel compelled in defending himself to explain and justify those acts before the judiciary. In essence, the evidentiary privilege affords prophylaxis against a possible breach of legislative immunity.[22] But if in a particular proceeding there is no immunity, and liability could be imposed for legislative acts, then it would be utterly senseless to continue to recognize an evidentiary privilege designed to shelter a nonexistent immunity. See *United States* v. *Craig*, *supra*, 528 F.2d at 782 (Tone, J., concurring).

b. The court of appeals asserted that recognition of a legislative privilege is strongly indicated by this Court's Speech or Debate Clause jurisprudence (Pet. App. 8a-15a). The court's analysis is fundamentally flawed, however, because a state legislator has no immunity from federal criminal prosecution; consequently, neither logic nor precedent supports respondent's claim of privilege. The court of appeals

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[22] The Speech or Debate Clause by its terms also contains a testimonial privilege barring the direct questioning of a Congressman regarding legislative acts—a privilege that presumably would apply even when there is no possibility of imposition of liability for such acts (as when the Congressman is called as a witness in a proceeding to which he is not a party). That aspect of the privilege is not pertinent to the question in the present case whether in a criminal trial the prosecution may introduce evidence of legislative acts, by means other than direct questioning of the legislator, to show the existence of an extortionate scheme.

failed to consider this proposition or to recognize its telling impact upon the proper disposition of the issue posed by this case.

It is well established that a federal common law immunity shields state legislators acting in their official capacity from monetary liability under the Civil Rights Act, 42 U.S.C. 1981-1985.[23] See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, *supra*, slip op. 11-14; *Tenney* v. *Brandhove*, 341 U.S. 367 (1951).[24] But even with regard to civil proceedings, the official immunity accorded state legislators falls short of the immunity provided federal Congressmen by the Speech or Debate Clause. See *Speech or Debate Privilege*, *supra*, 68 J. Crim. L. & Criminology at 51-54; *In re Grand Jury Proceedings*, 563 F.2d 577, 581-582 (3d Cir. 1977); *id.* at 587 (Gibbons, J., concurring); *United States* v. *Craig*, *supra*, 528 F.2d at 782 (Tone, J., concurring). Thus, the Speech or Debate Clause bars injunctive

[23] Judges and prosecutors also share in this absolute official immunity. See *Stump* v. *Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutors). See also *Butz* v. *Economou*, 438 U.S. 478, 508-517 (1978); *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); *Yaselli* v. *Goff*, 275 U.S. 503 (1927) (per curiam), aff'g 12 F.2d 396 (2d Cir. 1926); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). A state is, of course, free to provide such immunity from state liability if it sees fit to do so. *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, *supra*, slip op. 12-13.

[24] *Lake Country Estates* and *United States* v. *Brewster*, *supra*, 408 U.S. at 516 n.10, make clear that the recognition of legislative immunity in *Tenney* was based on federal common law and not the Speech or Debate Clause.

actions against Members of Congress acting in their official capacities. *E.g.*, *Eastland* v. *United States Servicemen's Fund*, *supra*; *Powell* v. *McCormack*, *supra*, 395 U.S. at 501-506; *Dombrowski* v. *Eastland*, *supra*. State legislators, on the other hand, are apparently amenable to suits seeking injunctive relief under federal law despite their official immunities. *Eg.*, *Jordan* v. *Hutcheson*, 323 F.2d 597, 601-602 (4th Cir. 1963); *Liveright* v. *Joint Committee of the General Assembly of the State of Tennessee*, 279 F. Supp. 205 (M.D. Tenn. 1968); see *Bond* v. *Floyd*, 385 U.S. 116 (1966); *Denny* v. *Bush*, 367 U.S. 908, aff'g 191 F. Supp. 871 (E.D. La. 1961). Cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.8 (1975) (injunction against state judges and prosecutor who are covered by absolute common law immunity).[25]

More important, this Court has repeatedly asserted in unequivocal terms that common law official im-

[25] The comparison between *Bond* v. *Floyd*, *supra*, and *Powell* v. *McCormack*, *supra*, is particularly instructive on this point. *Bond* involved a suit brought by Julian Bond against various Georgia state legislators for their refusal to allow Bond to take his oath of office and sit as a legislator. The Court held that Bond had been unconstitutionally deprived of his office and granted him injunctive relief against the individual legislators. In *Powell*, the Court also held that the plaintiff, a federal Congressman from New York, had been unconstitutionally deprived of his legislative office. The Court concluded, however, that only the House Sergeant-at-Arms and other House employees were amenable to suit and that, because of the Speech or Debate Clause, no injunctive relief was available against the individual Congressmen. Although the Court cited *Bond* in *Powell* with regard to the merits, see 395 U.S. at 513 n.35, there is no suggestion in *Powell* that *Bond* was improperly decided because of legislative immunity.

munity such as that recognized in *Tenney* v. *Brandhove, supra,* does not extend to criminal liability. For example, in *Gravel* v. *United States, supra,* the Court rejected a claim that the doctrine of official immunity protects a federal legislator and his aide from criminal liability or investigation with regard to acts that were not entitled to Speech or Debate Clause protection but were arguably within the purview of the legislator's official immunity. 408 U.S. at 627. The Court explained that "we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute" (*ibid.*).

That a state legislator's official immunity does not provide him with immunity from federal criminal liability is further evinced by the decision in *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). In that case, various individuals filed a class action against officials of the State of Illinois, including judges and prosecutors, claiming that the defendants' operation of the criminal justice system had deprived and would continue to deprive plaintiffs of their civil rights. *Id.* at 490-493. The Court ordered the complaint dismissed, concluding that plaintiffs had neither alleged a justiciable controversy nor stated a sound basis for equitable relief. *Id.* at 493-504. The Court explicated the latter point as follows (*id.* at 503; emphasis added):

> Nor is it true that unless the injunction sought is available federal law will exercise no deterrent effect in these circumstances. Judges who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights * * * must take account of 18 U.S.C. 242 * * * Whatever may be the case with respect to civil liability generally * * * *we have never held that the performance of the duties of* judicial, *legislative,* or executive *officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights.* * * * *On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress* * * *."

Similarly in *Imbler* v. *Pachtman,* 424 U.S. 409, 429 (1976), the Court reiterated that:

> [T]he policy considerations which compel civil immunity for certain governmental officials [do not] place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242 * * *.

Indeed, the decisions in *O'Shea* and *Imbler* strongly suggest that the federal civil immunity accorded state legislators has been "recognized at least partly because the availability of criminal sanctions * * * affords alternative protections [against corrupt state legislators]." *In re Grand Jury Proceedings, supra,* 563 F.2d at 587 (Gibbons, J., concurring).

Moreover, this distinction between civil and criminal liability appears well-founded. See *Speech or Debate Privilege, supra,* 68 J. Crim. L. & Criminology at

47; Note, *The Bribed Congressman's Immunity From Prosecution*, 75 Yale L.J. 335, 344-345 (1965); *Daniels* v. *Kieser*, 586 F.2d 64, 69 (7th Cir. 1978), cert. denied, No. 78-1221 (Apr. 30, 1979); *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1118-1119 (E.D. La. 1970). Any person can file a civil suit for damages in an attempt to harass or intimidate a legislator.[26] In contrast, federal criminal prosecutions may only be instituted by the Department of Justice

[26] As Judge Learned Hand explained in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. *There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.* [Emphasis supplied.]

At least one commentator has suggested that fear of private civil suits was the primary motivation for the adoption of speech or debate clauses by the states. See Field, *The Constitutional Privileges of Legislators*, 9 Minn. L. Rev. 442, 443 (1925).

and are subject to a "wide range of procedural protections for the accused, including indictment by grand jury [and] trial by jury under strict standards of proof * * *." *United States* v. *Brewster*, *supra*, 408 U.S. at 520. Although irresponsible federal prosecutors could file politically motivated charges against state legislators, there is no history of such abuses, which in any event are subject to review by Congress and the federal judiciary, as well as to critical scrutiny by the press. See *id.* at 522-523 n.16.

In sum, it seems clear that state legislators—like state judges, who also enjoy absolute immunity from civil suit for their judicial acts—are not immune from federal criminal liability for their legislative acts.[27] For example, if two or more legislators con-

[27] The federal government has in fact successfully prosecuted various state legislators for violations of federal law occurring in connection with the performance of their official duties. *E.g.*, *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, No. 78-879 (Jan. 15, 1979); *United States* v. *DiCarlo*, *supra*; *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *Homer*, 411 F. Supp. 972 (W.D. Pa. 1976). See also *Anderson* v. *United States*, 417 U.S. 211, 214-215 (1974). Similarly, official immunity does not bar the federal prosecution of judges and prosecutors for their criminal, albeit official, acts. See, *e.g.*, *Braatelien* v. *United States*, 147 F.2d 888 (8th Cir. 1945); *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1938); *United States* v. *Anzelmo*, *supra*, 319 F. Supp. at 1118-1119.

We further note that at least some states that have constitutional speech or debate provisions apparently permit prosecutions of state legislators based on legislative acts. See *Cox* v. *State*, 166 Tex. Crim. 587, 316 S.W. 2d 891 (1958); *People* v. *Logie*, 321 Mich. 303, 32 N.W. 2d 458 (1948); *State* v. *Ivanhoe*, 238 Mo. App. 200, 177 S.W. 2d 657 (1944); *Sims*

spire on the floor of the legislature to draft and introduce legislation for the purpose of depriving black persons of their civil rights, that conspiracy could be the res gestae of a prosecution under 18 U.S.C. 241 even though the indictment would be based on their legislative acts.[28] Similarly, if a state legislator introduced a bill that would damage certain private interests and then threatened to bring about its passage unless paid not to do so, his legislative act in introducing the bill could form the core of an extortion prosecution under the Hobbs Act.

If we are correct that the legislative acts of a state legislator enjoy no immunity from federal criminal prosecution comparable to those of a federal legislator, then no rational purpose is served by creating an evidentiary privilege against proof of such acts. This is doubly so where, as here, the federal government prosecutes a state senator for essentially non-legislative acts. See *Evidentiary Implications*, *supra*, 88 Yale L. J. at 1295-1297. Given the lack of underlying immunity and the nature of the charge, such a privilege would have no substantial tendency to protect legislative independence—the only societal interest conceivably supporting respondent's claim. This Court has never endorsed an evidentiary privilege

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v. *State*, 131 Ark. 185, 198 S.W. 883 (1917). Contra, *Blondes* v. *State*, 16 Md. App. 165, 294 A.2d 661 (Ct. Sp. App. 1972).

[28] Of course, the Speech or Debate Clause would immunize a similar conspiracy by federal Congressmen except to the extent it involved non-legislative acts. See *Ex parte Wason*, *supra*, cited with approval in *United States* v. *Johnson*, *supra*, 383 U.S. at 183.

(which by definition keeps highly relevant evidence from the jury) on such flimsy reeds. See *United States* v. *Nixon*, *supra*; *Clark* v. *United States*, *supra*; pages 20-24, *supra*.

c. Moreover, even assuming that state legislators do enjoy immunity from federal criminal prosecution directly based on their legislative acts, it does not follow that this Court should grant them the added benefit of a sweeping prophylactic evidentiary privilege comparable in scope to that under the Speech or Debate Clause. The Speech or Debate Clause is a constitutional directive prohibiting the questioning of a Congressman's legislative acts "in any other Place." The Clause itself therefore appears to constitute an evidentiary privilege as well as a source of immunity, and the Court has so applied the Clause in order to eliminate any possibility that a Congressman will be questioned or convicted on account of his legislative acts. See, *e.g.*, *United States* v. *Helstoski*, *supra*.

Respondent, on the other hand, at most relies on a common law immunity rather than the Constitution, and such immunities have never been construed as broadly as the Speech or Debate Clause. Compare *Powell* v. *McCormack*, *supra*, with *Bond* v. *Floyd*, *supra*. And at least where, as here, the government prosecutes a state legislator for non-immunized (*i.e.*, non-legislative) acts, and seeks to use evidence of his legislative acts only to corroborate other evidence of the defendant's clearly unprotected criminal conduct,[29]

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[29] Respondent's alleged extortion in connection with the extradition of a state prisoner and the introduction of legis-

extension of the official immunity to encompass an evidentiary privilege is unwarranted. Cf. *Doe* v. *McMillan*, *supra*, 412 U.S. at 320. The Court recognized an immunity in *Tenney* v. *Brandhove*, *supra*, in order to ensure legislative independence regarding bona fide legislative acts. In our view, it ignores "reason and experience" to suggest that a legislator —who *arguendo* is immunized from all direct civil and criminal liability for his legislative acts—will be chilled in the exercise of his legislative independence regarding bona fide legislative matters by the possibility that the federal government may use his legislative acts to prove his non-immunized, extra-legislative crime. See Note, *The Bribed Congressman's Immunity from Prosecution*, 75 Yale L.J. 335, 344-348 (1965).

2. The separation of powers doctrine that informs the Speech or Debate Clause does not support the recognition of a federal evidentiary privilege on behalf of state legislators

The court of appeals' analogy between a legislative privilege and the Speech or Debate Clause fails for still another reason. As we demonstrate below, the separation of powers doctrine is the seminal principle underlying the acceptance of legislative immunity in this country. Because the federal prosecution of a state senator does not implicate separation of powers concerns, the court of appeals' reliance on *United*

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lation are indistinguishable from the acts deemed non-legislative by this Court in *Johnson* and *Brewster*.

States v. *Johnson* and its progeny to create a new evidentiary privilege sets the holdings of those cases loose from their own explicitly stated rationale.

The Framers of our Constitution adopted the Speech or Debate Clause without substantial debate. See *Powell* v. *McCormack*, *supra*, 395 U.S. at 502. However, contemporaneous commentaries by members of the Constitutional Convention reflect the purpose that the Clause was intended to serve:

> [T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive.

8 *Works of Thomas Jefferson* 322 (Ford ed. 1904) (quoted in *United States* v. *Brewster*, *supra*, 408 U.S. at 548 (Brennan, J., dissenting)). See generally *id.* at 322-331. And James Wilson, a member of the committee that drafted the Clause, also wrote that the Clause was designed primarily to prevent a powerful executive from intimidating the legislators. See 2 *Works of James Wilson* 421 (McCloskey ed. 1967) (discussed in *Separation of Powers*, *supra*, note 17, 86 Harv. L. Rev. at 1139 & n.138). See also *The Federalist* No. 48 (J. Madison).

It is not surprising then that this Court has repeatedly confirmed that the Speech or Debate Clause was designed "to preserve the constitutional structure

of separate, coequal, and independent branches of government." *United States* v. *Helstoski*, *supra*, slip op. 13; see, *e.g.*, *Gravel* v. *United States*, *supra*, 408 U.S. at 616; *Powell* v. *McCormack*, *supra*, 395 U.S. at 502; *United States* v. *Johnson*, *supra*, 383 U.S. at 178, 181-182. As the Court stated in *United States* v. *Brewster*, *supra*, 408 U.S. at 508 (footnote omitted):

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

See also *Hutchinson* v. *Proxmire*, *supra*, slip op. 14; *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 6-7 & n.11; *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 502 & 511 n.17; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311 & 318 n.12; *id.* at 334 (Blackmun, J., dissenting). See generally *Separation of Powers*, *supra*, note 17.

That the separation of powers doctrine underlies the tradition of legislative immunity and privilege in this country is further reflected in the realities of

federal criminal prosecutions. Since it is the Executive which has generally unfettered discretion to institute criminal proceedings,[30] that branch of government needs no immunity from prosecution to protect its integrity and the balance of power between the coordinate branches. Similarly, the federal judiciary, which presides over all federal prosecutions, can as an institution protect itself from Executive overreaching by means of bad faith prosecutions of federal judges. The legislature, on the other hand, having enacted criminal laws of general application, is thereafter without direct power to protect its members against vindictive or politically motivated prosecutions.[31] The same relationships pertain, of course, in the states. Accordingly, it is the legislative branch that requires special immunity from criminal prosecutions based upon official legislative acts.

Since the adoption of legislative privileges in this country is inextricably linked to the separation of

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[30] See, *e.g.*, *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 9-11; *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965) (only representatives of the Executive Branch may initiate prosecution). Moreover, the President possesses the pardon power.

[31] Of course, the legislature may ultimately protect itself to some extent by cutting off funds to the Executive, holding congressional inquiries, and rewriting legislation. That power cannot undo a prosecution, however. Furthermore, Congress often would not act to protect a particularly outspoken opponent of the Executive because of political alliances between the majority of Congress and the incumbent administration, and it is largely such individuals that the Clause was designed to protect.

powers doctrine,[32] the court of appeals' derivation of a legislative privilege for a state senator from the Speech or Debate Clause case law is sound only if the legislative privilege so created effectuates separation-of-powers objectives. But it is beyond dispute that "the separation-of-powers principle * * * has no applicability to the federal [government's] relationship to the States," *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976) (plurality opinion), much less to an individual state official of any branch of state government. The court of appeals' recognition of respondent's claim of privilege thus casts the concept of legislative privilege far adrift from its traditional legal moorings.

C. Admission Of Evidence Of Legislative Acts Of State Legislators In A Federal Criminal Trial Is Not Incompatible With A Due Regard For The Independent Functioning Of State Government

It has been suggested that the evidentiary privilege that respondent asks the federal courts to create on his behalf is compelled by "[p]rinciples of federal-state comity." *United States* v. *Craig*, *supra*, 528 F.2d at 779; see also Resp. Br. in Opp. 12. We submit, however, that neither principles of federalism embodied in the Constitution itself nor judicially evolved doctrines of comity justify the interference in the administration of federal criminal justice that would result from adoption of a state legislator's privilege in federal trials.

1. The Tenth Amendment undoubtedly places some limits on the exercise of the federal government's regulatory powers under the Commerce Clause with regard to the "integral governmental functions" of state and local governments. *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976).[33] But whatever the concept of "integral governmental functions" may encompass,[34] the instant prosecution (including the government's proposed evidentiary use of respondent's legislative acts) cannot fairly be described as "directly displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

We note initially that the prosecution itself does not violate the Constitution. The courts have repeatedly upheld the constitutionality of Hobbs Act con-

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[32] Most states do not appear to extend the legislative privilege provided by state statutes and constitutions to legislative officials of subordinate jurisdictions such as county legislators and municipal councilmen or aldermen. See, *e.g.*, *McClendon* v. *Coverdale*, 57 Del. 568, 203 A.2d 815 (Super. Ct. Del. 1964); Prosser, *Torts* 782 (4th ed. 1971); 1 F. Harper & F. James, *The Law of Torts* 428-429 & n.6 (1956); cf. *Jacobs* v. *Underwood*, 484 S.W. 2d 855 (Ky. Ct. App. 1972) (common law did not grant privilege to municipal legislators; changed by statute).

[33] The Hobbs Act, 18 U.S.C. 1951, under which respondent is charged, is a statute enacted pursuant to Congress's power to regulate commerce. See, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 373 & 380 (1978).

[34] See Michelman, *States' Rights and States' Roles: Permutations of State "Sovereignty" in National League of Cities* v. *Usery*, 86 Yale L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977).

victions of corrupt state and local officials. See, *e.g.*, *United States* v. *Mazzei, supra; United States* v. *Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc) (Stevens, J.), cert. denied, 423 U.S. 837 (1975); see also *Perez* v. *United States*, 402 U.S. 146 (1971). Since the alleged conduct at issue in this case violates both federal and Tennessee law,[35] there is no basis for a claim that this prosecution interferes with a fundamental program of the State of Tennessee. Moreover, as the Court specifically pointed out in *National League of Cities*, Congress has significantly greater power under the Commerce Clause to regulate the actions of individuals than to regulate the essential actions of a State.[36] In *National League of Cities*, the Court held

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[35] See Tenn. Code Ann. § 39-802; see also §§ 39-3203, 39-3204 (1975). The district court, in a ruling not challenged here, held that allegations underlying one of the counts in respondent's indictment did not make out a violation of Section 39-802 because his alleged extortion regarding the extradition of a Tennessee prisoner did not come before him "in his official capacity." See A. 8-9. This conclusion seems at least superficially inconsistent with the court's subsequent conclusion that respondent's acts with regard to the extradition were privileged legislative acts. In any event, respondent's alleged attempt to interfere with the extradition violated the spirit if not the letter of Tennessee law. See *Williams* v. *State*, 34 Tenn. 160, 162 (1854) ("[Extortion] is the taking by color of an office, money or other thing of value, that is not due * * *.").

[36] See 426 U.S. at 845:

> It is one thing to recognize the authority of Congress to enact laws regulating individuals[s] * * * necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite

unconstitutional the federal government's attempt to regulate the wages of state employees because of the undue and direct interference with essential state functions occasioned by the statute in question. Here, in contrast, the government does not seek to interfere with the manner in which government organs of the State of Tennessee function, but rather is attempting to prosecute an individual state senator for his criminal acts. See also *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law * * *."); *Ex parte Young*, 209 U.S. 123, 159-160 (1908).

Nor can there be any real question about the constitutional power of this Court to allow the federal government to use evidence in a federal criminal trial that would be privileged under state law. As detailed above, the Court has long recognized that questions of privilege in federal prosecutions are controlled by federal law regardless of applicable state privileges. See pages 17-19, *supra; Wolfle* v. *United States*, *supra*. Indeed, the rules of evidence as promulgated by this Court would not have recognized a legislative privilege even in diversity cases,[37] and there is little doubt that the application of such a general rule of evidence in the federal courts would be constitutional.

> another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

[37] See page 16, *supra*.

See *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965). Moreover, Congress has expressly determined that even where a state is itself a party to a case otherwise governed by federal law, "the privilege of a * * * government, State, or political subdivision thereof shall be governed by the principles of the [federal] common law * * *." Fed. R. Evid. 501. A fortiori then, the rejection of respondent's claim of privilege in a federal criminal trial does not violate the Tenth Amendment. See also *Bond* v. *Floyd*, *supra*.[38]

2. It remains to consider whether concerns of comity and federalism justify the decision below. The suggestion is that although the Constitution may not compel recognition of a legislative privilege, federal courts ought to defer to the state law of privilege at least with regard to state legislators. Such a claim must, however, surmount significant obstacles. To begin with, the proverbial demand for every man's evidence generally outweighs even claims of privilege based on (but not compelled by) constitutional rights. See *Herbert* v. *Lando*, *supra*; *Nixon* v. *United States*, *supra*; *Branzburg* v. *Hayes*, *supra*. See generally

[38] In *Bond* v. *Floyd*, the Court held that one state legislator could get injunctive relief against various other state legislators for their discriminatory, albeit legislative, acts. Apparently, neither the injunction nor the use of legislative acts offended the Tenth Amendment. *Bond*, of course, involved an exercise of federal power not arising under the Commerce Clause. But the Court's (or Congress's) power to determine the rules of evidence to be applied in federal criminal trials does not derive from the Commerce Clause either. See *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852 n.17.

pages 20-24, *supra*. And here, the connection between claimed evidentiary privilege and vital state interests is quite attenuated.

We assume that, because the Tennessee privilege tracks the language of the Speech or Debate Clause, it would preclude admission of respondent's legislative acts in a state criminal trial.[39] Moreover, like the parallel provision found in the federal Constitution, the Tennessee legislative privilege effectuates the separation of governmental powers within the State of Tennessee. See generally Tenn. Const. Art. II, Secs. 1-2; *Moore* v. *Love*, 171 Tenn. 682, 685-687, 107 S.W. 2d 982, 983 (1937); *Richardson* v. *Young*, 122 Tenn. 471, 491-493, 125 S.W. 664, 667-668 (1910). Therefore, this prosecution, which does not affect the balance among the branches of the government of the State of Tennessee, does not implicate the policy animating Tennessee's privilege.

Even if Tennessee's policy of immunity for legislative acts were significantly rooted in concerns other than separation of powers, those concerns would not be sufficiently powerful to merit creation of a federal evidentiary privilege for its legislators. In the first

[39] We are unaware of any authoritative construction of Article II, Sec. 13 of the Tennessee Constitution. Cf. Comment, *Absolute Privilege in Tennessee*, 30 Tenn. L. Rev. 397, 405 (1963) (absolute civil privilege). Insofar as Tennessee, like some other states (see note 27, *supra*), would allow a state prosecutor to use such evidence, there is absolutely no basis for respondent's claim of privilege. We further note that the fact that at least some states apparently permit prosecutions of state legislators based on legislative acts militates strongly against the creation of a common law legislators' privilege.

place, there is no significant likelihood that federal prosecutions will chill legitimate legislative activities. See pages 38-40, *supra;* see also *Evidentiary Implications*, *supra*, 88 Yale L. J. at 1288, 1295-1297.[40] But beyond that, the judgment has already been made that, with due recognition of the value to state government of immunity for state officials performing critical functions, such immunity is nevertheless to be confined in the federal courts to civil cases. Thus, state judges and prosecutors, whose immunity stems from the same kinds of concerns about fostering uninhibited performance of critical governmental functions as does that of state legislators, are subject to federal criminal prosecutions implicating their performance of official duties. See discussion at pages 31-39, *supra*. Since the federal government bears essentially the same relationship to state legislators as it does to state judges or prosecutors (and, concomitantly, federal prosecutions of any of these officials pose the same kind of "threat" to the discharge of state governmental functions) there is no rational basis for affording legislators the benefit of a special evidentiary privilege or prosecutive immunity.

[40] The federal criminal law does not immunize a state senator's legislative acts. Therefore, even assuming that the possibility of federal criminal prosecution might chill bona fide legislative independence (but see Note, *The Bribed Congressman's Immunity From Prosecution*, 75 Yale L.J. 335, 343-345 (1965)), recognizing respondent's claim of privilege will not preclude federal prosecutors from intimidating state legislators and forcing them to bear the burdens of litigation. Acceptance of respondent's contention would undoubtedly make the government's task in prosecuting corruption cases involving legislators more difficult. But it is inconceivable that a legislator, who is substantially protected as to all liability under state law and civil liability under federal law, will fail to act or to speak his mind about bona fide governmental matters because the federal government's chances of convicting him, as opposed to indicting him, are somewhat improved.

Balanced against the extremely attenuated connection between respondent's claim of privilege and the federalism concerns underlying the Tenth Amendment are two weighty federal interests. First, there is a substantial federal interest in successfully prosecuting corrupt state officials. Both the Hobbs Act, 18 U.S.C. 1951(b)(2), and the Travel Act, 18 U.S.C. 1952, are specifically directed at extortion by, and bribery of, state officials, including state legislators. See, *e.g.*, *United States* v. *Mazzei*, *supra*, 521 F.2d at 643-645. See also 18 U.S.C. 1541 (prohibiting state officials from purporting to issue passports) and 1511(a)(2) (making obstruction of state criminal law enforcement by any state official a federal crime); see H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 52-53 (1970).[41] And second, there is the fundamental and comprehensive need of the criminal justice system to develop all relevant evidence. See *United States* v. *Nixon*, *supra*, 418 U.S. at 708-709. Although the demand for every man's evidence is implicated by all claims of privilege, it is especially compelling here, where use of the disputed evidence neither offends the

[41] In addition to using various laws that are expressly directed against official corruption, the federal government has prosecuted state legislators or other officials under the mail fraud and wire fraud statutes, 18 U.S.C. 1341, and 1343. See, *e.g.*, *United States* v. *Craig*, *supra*, 528 F.2d at 774.

Constitution nor interferes with a confidential relationship. To paraphrase Mr. Justice Cardozo, given these overriding federal interests, recognition of a legislative privilege would simply entail payment of too high a price for whatever minimal increment of serenity of mind a state legislator could arguably derive from such a privilege. See *Clark* v. *United States*, *supra*, 289 U.S. at 14.[42]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[42] Respondent's federalism argument is further belied by Congress's express determination that federal law governs the evidentiary privileges of a state-qua-state in a federal criminal trial. See Fed. R. Evid. 501.

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